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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

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**No. 78-1559**

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HALBERT D. BROOKS, *Petitioner,*

v.

THE WASHINGTON TERMINAL COMPANY,  
*Respondent.*

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On a Petition for a Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia Circuit

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**BRIEF FOR RESPONDENT  
WASHINGTON TERMINAL COMPANY  
IN OPPOSITION**

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**OPINIONS BELOW**

The unreported Memorandum Opinion and order of the United States District Court for the District of Columbia, and the unreported unanimous decision of the United States Court of Appeals for the District of Columbia Circuit, affirming the order of the District Court, are set forth in the Appendix to the Petition (App. C, at 6a-16a; App. D, at 26a-33a).

### JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

### QUESTION PRESENTED

Whether, within the contemplation of Supreme Court Rule 19, a special or important question is presented in an assault case brought by Petitioner under the Federal Employers' Liability Act (45 U.S.C. § 51, *et seq.*), where the courts below denied recovery on the basis that the evidence, even when viewed in the light most favorable to Mr. Brooks, failed to make a case for the jury under either settled theory of liability applicable to such actions under the Act?

### STATEMENT OF THE CASE

Mr. Brooks, Plaintiff in the District Court, filed his complaint under the Federal Employers' Liability Act (45 U.S.C. § 51, *et seq.*), alleging personal injuries sustained by him while working as a foreman for respondent Washington Terminal Company, asserting said injuries resulted from an assault by one Daryl Garnett, a subordinate (App. A, 1a-3a).

Following discovery and pretrial, the case was tried on two alternative theories advanced by Mr. Brooks: (1) that the assault was committed in the course of discharge of Mr. Garnett's duties and in furtherance of the work of the Terminal; and (2) that the Terminal was negligent (a) in hiring Mr. Garnett; (b) in failing to warn Mr. Brooks of Mr. Garnett's alleged propensity to do harm; and (c) in violating its Rule G, which requires employees not to possess narcotics on Terminal premises (App. C, at 10a).

A jury verdict was rendered in Mr. Brooks' favor in the amount of \$80,000, the entry of which was delayed by order of the trial judge, who granted leave to the Terminal to file a renewal of its motion for directed verdict (directed verdict motions having been denied during trial, without prejudice). The renewed motion for a directed verdict was granted by the District Court (App. C, at 6a-7a), the order accompanied by a Memorandum Opinion (App. C, at 8a-16a), explaining in detail the basis for the court's ruling, *i.e.*, considering all the evidence and drawing all inferences in favor of Mr. Brooks, there was no proof upon which a finding of liability could be predicated, upon either of the theories of recovery as advanced by Mr. Brooks. In its ruling, the District Court conditionally found that a new trial should be granted for the reason that a review of all the evidence disclosed that the verdict was "certainly contrary to the weight of the evidence" (App. C, at 15a, f.n.4).

Petitioner Brooks then appealed the order granting the directed verdict and entering judgment in favor of the Terminal to the United States Court of Appeals for the District of Columbia Circuit. Following oral argument, that Court unanimously affirmed by a decision issued January 17, 1979, in which it carefully analyzed, on the basis of the settled standards promulgated by this Court, the total lack of evidence upon which any recovery could be had under either of the alternative theories advanced by Mr. Brooks in the District Court (App. D, 26a-33a).

The Petition herein results from that decision.

## ARGUMENT

### There Are No Special or Important Reasons for Granting the Writ

The general criteria for granting a Writ of Certiorari are set forth in Rule 19 of the Rules of this Court. As will be discussed, the decision below was in accordance with the decisions of this Court pertaining not only to the theories of recovery, but also the test for the sufficiency of the evidence in such cases brought under the Federal Employers' Liability Act. The case involves no new or novel theory not heretofore settled by this Court.

As demonstrated by the unanimous decision of the United States Court of Appeals for the District of Columbia Circuit (App. D, at 26a-33a), the evidence was carefully considered under the criteria established by this Court as to both theories of recovery advanced by Mr. Brooks in the District Court. As did the trial judge, the Court of Appeals was satisfied, after a perspicacious review of the evidence, that Mr. Brooks' proof, and all inferences therefrom, when viewed in the light most favorable to him, did not justify with reason, the conclusion that employer negligence played any part, even the slightest, in producing the injury.

## I

### The Decision Below was Predicated Upon Applicable Decisions of This Court

The test of the sufficiency of the evidence used in the decision below was that established by this Court in *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 506 (1957), where the Court held the test as being:

"... simply whether the proofs justify with reason the conclusion that employer negligence played any

part, even the slightest, in producing the injury or death for which damages are sought."

There is no claim by Mr. Brooks that the *Rogers* test is inappropriate, nor could there be, for he has consistently advocated *Rogers* in his briefs in the District Court, the Court of Appeals, and in his Petition to this Court.

Moreover, the decision below (App. D, at 30a) proceeded on the basis of the *Rogers* standard, and while recognizing the liberality of the test, agreed with the District Court that the evidence and inferences therefrom, viewed in the light most favorable to Mr. Brooks, failed to make a case for the jury (App. D, at 30a-31a). Thus, Mr. Brooks cannot be heard to claim that the decision below departed from the well-settled legal standard of review as to the test for the sufficiency of the evidence, as established by this Court, for cases brought under the Federal Employers' Liability Act.

Turning then to the theories of recovery advocated by Mr. Brooks in the trial court, the decision below correctly recognized that the case had proceeded on two theories of liability which have been developed by this Court in cases involving intentional assaults by fellow employees. The first theory applies the doctrine of *respondeat superior*, including intentional torts within the term "negligence" as used in the Act, where the assault is committed by an employee in the course of the discharge of that employee's duties and in furtherance of the work of the employer's business, said theory emanating from *Jamison v. Encarnacion*, 281 U.S. 635 (1930), long-since applied to Federal Employers' Liability Act cases in the District of Columbia. See *Slaughter v. Atlantic Coast Line Railroad*, 302 F.2d 912 (D.C.



Cir., 1962). The second theory of liability is based upon negligence on the part of the railroad if it fails to prevent reasonably foreseeable danger to an employee from intentional or criminal conduct, this theory emanating from *Harrison v. Missouri Pacific Railroad*, 372 U.S. 248 (1963), a case where a supervisor was allowed recovery for an assault by his subordinate, where the railroad had notice the subordinate was a "trouble-maker".

Testing, as it did, the sufficiency of the evidence on the basis of the *Rogers* test, in light of the elements of proof as established under the *Jamison* and *Harrison* cases as being necessary for recovery, the decision below was clearly predicated upon the applicable decisions of this Court, and presents no special or important reasons for granting the Writ.

## II

### The Decision Below Was Manifestly Correct

The decision below was predicated upon prior decisions of this Court, and was manifestly correct, as can be seen from the evidence pertaining to the issue of liability, which can be summarized as follows:

Daryl Garnett (the assailant) was hired by Washington Terminal five months prior to the incident. He denied previous convictions for crimes on his employment application, and there was submitted therewith a certification by the Metropolitan Police Department of the District of Columbia that Mr. Garnett had "no record".<sup>1</sup> A check by Washington Terminal with Garnett's

<sup>1</sup> Mr. Garnett, in fact had no record for conviction of this charge. In the District of Columbia, arrest records can only contain listings of convictions. DC REG 73-22 § 21.6.

only previous employer, the District of Columbia Department of Recreation, disclosed an evaluation of performance, conduct and attendance as average, and indicated him to be an honest, dependable, and generally desirable employee (App. C, at 27a-29a, 32a).

During the course of his five-month employment prior to the assault, Mr. Garnett had maintained a spotless disciplinary record (Joint Appendix, 20, Plaintiff's Trial Exhibit No. 7, Page 20). Moreover, when Mr. Garnett was transferred to Mr. Brooks' department, Mr. Brooks was not given any information that Mr. Garnett had any inclination toward violence, or that he was in any way a disciplinary problem (Transcript 78). In fact, Mr. Brooks himself testified that he had no prior problems with Mr. Garnett (Transcript 80-81). Immediately prior to the assault, the evidence showed that the conversation between the two men was ordinary and normal; it was neither heated nor characterized by violent temper, action or reaction (Transcript 83, 87). Prior to Mr. Garnett suddenly turning and striking Mr. Brooks, neither Mr. Brooks nor anyone else present had anticipated the assault.<sup>2</sup>

After the incident, Mr. Garnett was arrested in the locker room, and a search revealed what appeared to be marijuana. When charged in court, a record check dis-

<sup>2</sup> The Petition, in the Statement of the Case (Page 5) asserts in italics without benefit of citation to the record: "The respondent railroad also told Petitioner they had no duty to protect him from this criminal assault under the Federal Employers Liability Act." Lest there be any misunderstanding to the effect that there was such a discussion, the respondent asserts that not only does no such statement appear in the record, but also that there was no evidence whatsoever that any such conversation ever took place. It is presumed that such statement in the Petition was asserted in the spirit of appellate advocacy, and was not intended to mislead.

closed that he had been previously arrested, but not convicted, for petty larceny and possession of drugs. He was dismissed from his Washington Terminal employment as a result of the assault and possession of marijuana (App. D, 28a, 32a). There was no evidence that Mr. Garnett was on, or had recently smoked any marijuana at the time of the assault or that even if he had, that it produced a violence syndrome (App. C. 14a).

On the basis of the foregoing, the decision below, as did that of the District Court, carefully analyzed all the evidence, as well as the lack thereof, and concluded there was no proof whatsoever that the assault was done in the course of Mr. Garnett's duties and in furtherance of the work of the Washington Terminal, thus failing to provide any basis for recovery under the theory of *Jamison v. Encarnacion, supra*. A similar conclusion was reached by both courts on Mr. Brooks' theory of negligence under *Harrison v. Missouri Pacific Railroad, supra*, that is, there was a total lack of proof of any negligence whatsoever by Washington Terminal in hiring Mr. Garnett, retaining him in employment, or in any way failing to anticipate the assault. Of course, *Harrison* involved testimony showing that prior to the incident, there had been discussions that the assailant was known to be a "troublemaker" and a "bad actor".

Thus, the unanimous decision below, viewing all proofs and inferences in the light most favorable to Mr. Brooks under the theories established by the previous decisions of this Court applicable to such cases, was manifestly correct.

# CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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